United States Department of Labor
Employees' Compensation Appeals Board

R.I., Appellant	)	
	)	**Docket No. 09-1559**
and	)	**Issued: August 23, 2010**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Barbourville, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 3, 2009 appellant filed a timely appeal of the May 15, 2009 merit decision of the Office of Workers' Compensation Programs denying his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant's claim for a left knee schedule award was precluded by his refusal of suitable work under 5 U.S.C. § 8106(c).

FACTUAL HISTORY

This case has previously been before the Board. In a June 21, 2001 decision, the Board found that the Office properly terminated appellant's monetary compensation benefits as of

January 31, 1998 based on his refusal of suitable employment.[1] The facts of the case as set forth in the Board's prior decision are incorporated by reference. The record reveals that on February 9, 1988 the Office had granted appellant a schedule award for 28 percent impairment of his right leg.[2] The period of the award ran from December 15, 1987 to July 1, 1989.

On April 4, 2008 appellant requested a schedule award. On May 7, 2008 the Office informed him that his monetary benefits under the Federal Employees' Compensation Act had been terminated on January 31, 1998 based on his refusal of suitable work. It advised appellant that under 5 U.S.C. § 8106(c) a partially disabled employee who refuses suitable work is not entitled to compensation, including a schedule award. In letters dated May 12 and June 18, 2008, appellant asserted that he was entitled to a schedule award. He contended that section 8106(c) applied to wage-loss benefits and not to monetary compensation paid under a schedule award. Appellant referenced a March 14, 1997 report from Dr. McAllister as support for his claim of permanent impairment.

On August 22, 2008 appellant filed a CA-7 schedule award claim for his left knee. He stated that he previously submitted a Form CA-7 in March 1994 when his left knee condition had been approved by the Office. Appellant stated that Dr. McAllister found that he had seven percent impairment on March 14, 1997.

The employing establishment submitted records of treatment by Dr. McAllister dated June 9, 1993 to May 14, 1997. Dr. McAllister noted that appellant worked as a mine inspector in low areas which placed stress on his knees. Appellant underwent extensive right knee surgery in September 1986. In a July 27, 1994 report, Dr. McAllister noted that he had pain and progressive loss of range of motion to both knees and diagnosed degenerative osteoarthritis of the knees. On March 14, 1997 Dr. McAllister provided a note advising that appellant had seven percent whole body impairment secondary to problems with his left knee under the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[3]

On October 17, 2008 the Office denied appellant's claim for a schedule award. It found that appellant had refused suitable work pursuant to 5 U.S.C. § 8106(c) and was not entitled to monetary compensation under a schedule award.

On October 27, 2008 appellant requested a telephonic oral hearing which was held on February 12, 2009. On February 20, 2009 he stated that his bilateral knee osteoarthritis had deteriorated and that his physician recommended bilateral knee replacements. Appellant submitted the February 19 and March 17, 2009 reports of Dr. Brian Edkin, a Board-certified

[1] Docket No. 99-113 (issued June 21, 2001). The Office accepted a right medial meniscus tear for which appellant underwent surgery on September 23, 1986. On February 28, 1994 appellant filed a traumatic injury claim after slipping in snow. This claim was accepted for bilateral osteoarthritis of the knees on September 1, 1994 in file number xxxxxx692. In January 1995, appellant's claim was accepted for aggravation of degenerative lumbar disc disease in file number xxxxxx568. The claims were consolidated.

[2] The award was based on the opinion of Dr. Gary K. McAllister, a Board-certified orthopedic surgeon.

[3] A.M.A., *Guides* (4th ed. 1993).

orthopedic surgeon, who diagnosed bilateral knee degenerative arthritis. He listed findings on range of motion of both knees, normal stability and strength and no atrophy. Dr. Edkin noted that appellant had previously received an impairment rating of the right knee and recommended that he be referred to a qualified medical examiner for a current impairment evaluation. He diagnosed bilateral advanced degenerative arthritis of the knees and recommended bilateral arthroplasty.

In a May 15, 2009 decision, an Office hearing representative affirmed the October 17, 2008 schedule award denial.

LEGAL PRECEDENT

Section 8106(c)(2) of the Act[4] states that a partially disabled employee who refuses to seek suitable work or refuses or neglects to work after suitable work is offered to, procured by or secured for him is not entitled to compensation.[5] The implementing regulations provide that a partially disabled employee who refuses to seek suitable work, or refuses to or neglects to work after suitable work is offered to or arranged for him or her, is not entitled to compensation, including compensation for a schedule award under 5 U.S.C. § 8107.[6]

Maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further. The determination of whether maximum medical improvement has been reached is based on probative medical evidence.[7]

ANALYSIS

Appellant's claims were accepted by the Office for a right medial meniscus tear for which he underwent surgery in 1986, bilateral osteoarthritis of the knees and aggravation of lumbar degenerative disc disease. On February 9, 1988 he received a schedule award for 28 percent impairment of his right knee. He contends on appeal that he should receive a schedule award for his left knee and that he has bilateral knee arthritis for which arthroplasty has been recommended.

As noted, on January 31, 1998 the Office terminated appellant's wage-loss benefits and entitlement to monetary benefits under a schedule award based on his refusal to accept a suitable job offer. It did not terminate his medical benefits. It is well established that section 8106(c) serves as a bar to further wage-loss compensation for disability arising from the accepted employment injury and monetary benefits paid for impairment under a schedule award. In *Stephen R. Lubin*,[8] the Board held that monetary compensation payable to an employee under

[4] 5 U.S.C. § 8106(c)(2).

[5] *Id.*

[6] *See* 20 C.F.R. § 10.517.

[7] *See Mark A. Holloway*, 55 ECAB 321 (2004).

[8] 43 ECAB 564 (1992).

section 8107, the schedule award provision, constitutes payment from the Employees' Compensation Fund subject to the penalty provision of section 8106(c).[9] It is to be noted, however, that in the case of a schedule award the Office has the obligation to determine whether the date of maximum medical improvement arose prior to the date of termination under section 8106(c) in consideration of an employee's possible entitlement to schedule benefits.

The October 17, 2008 decision of the Office claims examiner listed appellant's accepted conditions and noted the prior schedule award to the right knee in 1988. Appellant's claim for a schedule award was denied under section 8106(c) without any consideration as to the date of maximum medical improvement regarding either knee. This deficiency was cured by the Office hearing representative as the May 15, 2009 decision addressed the medical evidence submitted by appellant. The March 14, 1997 note from Dr. McAllister, who provided a seven percent whole person impairment rating based on appellant's left knee condition, was found insufficient to establish the basis on which the rating was made or maximum medical improvement with regard to the accepted left knee osteoarthritis. The hearing representative found that the brief note of Dr. McCallister failed to provide any description of the impairment to appellant's left knee in terms of degrees of range of motion, decrease in sensation or motor strength or other pertinent depiction of the factors he took into consideration in rating impairment. It is noted that a description of impairment in terms of "whole person" or "whole body" is not probative as to the extent of loss of use of a specific scheduled member of the body under section 8107.[10] Based on the inadequacy of the March 17, 1997 note, the hearing representative properly determined that maximum medical improvement of the left knee could not be established prior to the termination of benefits on January 31, 1998.[11]

Dr. Edkin addressed appellant's bilateral knee condition based on examination in 2009. He noted as part of the medical history that appellant had previously received an impairment rating of the right knee. Dr. Edkin deferred making any impairment rating to either of appellant's lower extremities, did not address the issue of maximum medical improvement and did not explain whether any impairment arose before January 31, 1998. Therefore, his reports are not probative and do not establish that appellant was at maximum medical improvement regarding his left knee prior to the termination of monetary benefits.

On appeal appellant noted that he had recent knee surgery and would require additional surgery in the future. The Board notes that section 8106(c) pertains to monetary compensation for disability or permanent impairment. Appellant's right to medical treatment related to his accepted bilateral knee osteoarthritis was not terminated or addressed in the decision on appeal.[12]

[9] *See also Ronald P. Morgan*, 53 ECAB 358 (2002); *Sandra A. Sutphen*, 49 ECAB 174 (1997).

[10] *See Tommy R. Martin*, 56 ECAB 273 (2005). *See also Lela M. Shaw*, 51 ECAB 372 (2000) (the Board found that a physician's opinion which does not address impairment in terms of the A.M.A., *Guides*, based on findings of pain, loss of range of motion or loss of strength, is insufficient to establish permanent impairment).

[11] Appellant is not precluded from submitting medical evidence from an attending physician pertaining to the issues of maximum medical improvement or impairment to either lower extremity.

[12] The Board notes that there is no Office decision regarding the denial of any medical treatment and this is not an issue currently on appeal. *See* 20 C.F.R. § 501.2(c).

The medical evidence of record, however, does not establish that he reached maximum medical improvement as to his left knee prior to Janaury 31, 1998.

CONCLUSION

The Board finds that appellant did not establish maximum medical improvement of his left knee prior to the termination of his monetary benefits under section 8106(c).

ORDER

IT IS HEREBY ORDERED THAT the May 15, 2009 and October 17, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: August 23, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board